

33456

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

FIRST CHARLES TOWN GROUP, INC.,
a West Virginia Corporation; CHARLES
TOWN LIMITED PARTNERSHIP VI,
a West Virginia Limited Partnership;
HARRY M. KABLE and CAROL F.
KABLE, husband and wife; LARRY R.
FRITTS, SR.; and RICHARD W.
WEESE and MARIA V. WEESE,
husband and wife,

PETITIONERS

VS.

IN MANDAMUS UPON
ORIGINAL JURISDICTION

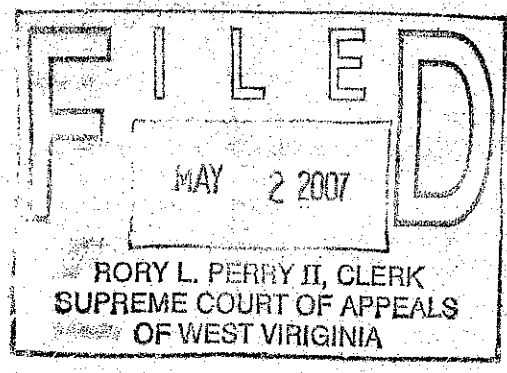
THE COUNTY COMMISSION OF
JEFFERSON COUNTY, a public body
corporate of the State of West Virginia;
and
FRANCES B. MORGAN, President and
Member; ARCHIBALD M.S. MORGAN,
III, Member; C. DALE MANUEL, Member;
JAMES T. SURKAMP, Member; and
GREGORY A. CORLISS, Member,
and
JENNIFER MAGHAN, Clerk, County
Commission of Jefferson County,

RESPONDENTS

PETITION OF
FIRST CHARLES TOWN GROUP, INC., CHARLES TOWN
LIMITED PARTNERSHIP VI, HARRY M. KABLE AND CAROL F. KABLE, LARRY R. FRITTS,
SR., AND RICHARD W. WEESE AND MARIA V. WEESE
FOR A WRIT OF MANDAMUS

Peter L. Chakmakian
Alice Anne Chakmakian
P.O. Box 547
Charles Town, WV 25414
(304) 725-9797

Attorneys for the Petitioners



**PETITION OF
FIRST CHARLES TOWN GROUP, INC., CHARLES TOWN LIMITED
PARTNERSHIP VI, HARRY M. KABLE AND CAROL F. KABLE, LARRY R.
FRITTS, SR., AND RICHARD W. WEESE AND MARIA V. WEESE
FOR A WRIT OF MANDAMUS**

TO THE HONORABLE JUSTICES OF THE SUPREME
COURT OF APPEALS OF WEST VIRGINIA:

The Petitioners, First Charles Town Group, Inc., Charles Town Limited Partnership VI, Harry M. Kable and Carol F. Kable, Larry R. Fritts, Sr., and Richard W. Weese and Maria V. Weese, by counsel, Peter L. Chakmakian and Alice Anne Chakmakian, respectfully represent to the Court as follows:

I. INTRODUCTION

This Court has jurisdiction over this action pursuant to the Constitution of the State of West Virginia, Article VIII, § 3 and West Virginia Code §51-1-3 (2006). The Respondent, County Commission of Jefferson County (hereinafter referred to as the "County Commission") is a public body corporate of the State of West Virginia created by Article IX, Section 9 of the Constitution of the State of West Virginia. The Respondent, Frances B. Morgan, is the President of the County Commission; the Respondents, Archibald M.S. Morgan, III, C. Dale Manuel, James T. Surkamp, and Gregory A. Corliss, are duly elected members of the County Commission; the Respondent, Jennifer Maghan, is the Clerk of the County Commission, duly elected by the voters of said county in accordance with Article IX, Section 12 of the Constitution of the State of West Virginia. The Petitioners, First Charles Town Group, Inc., Charles Town Limited Partnership VI, Harry M. Kable and Carol F. Kable, Larry R. Fritts, Sr., and Richard W. Weese and Maria V. Weese (hereinafter jointly and severally referred to as the "Petitioners") are the owners of six (6) parcels of real property situate in Jefferson County, West Virginia, adjacent to and abutting the corporate limits of the City of

Charles Town, a municipal corporation (hereinafter referred to as "the City"). The City Council for the City is the governing body of the municipality and is granted the power and jurisdiction as the governing body of the City pursuant to W.Va. Code §8-6-4 to "provide for the annexation of additional territory without ordering a vote on the question" if certain conditions are met. W.Va. Code §8-6-4.

The Petitioners presented, pursuant to the aforesaid Code provision, a request to be annexed into the City. The Petitioners have complied with every aspect of the aforesaid Code provision. The City adopted an Ordinance in accordance with the provisions of the W.Va. Code relating to the adoption of ordinances by a municipality. Thereafter, the City presented to the Respondents a Certificate of Annexation pursuant to said Ordinance and a proposed Order of Annexation, which the Respondents refused to approve, confirm and have entered.

Petitioners seek that a rule be issued by this Honorable Court directed to the Respondents, Frances B. Morgan, President of the County Commission, and Jennifer Maghan, Clerk of the County Commission, to show cause, if they can, why they should not approve, confirm and enter a certain Annexation Order drafted and presented in accordance with W.Va. Code §8-6-4; that after the Respondents shall have had an opportunity to respond to such rule, this Honorable Court issue a peremptory writ of mandamus commanding the Respondents to sign and enter the Annexation Order as required by W.Va. Code §8-6-4; and that this Honorable Court do give Petitioners such other and further relief, including attorneys fees, as it may deem appropriate and as this case may require.

II. PROCEDURAL HISTORY

An ordinance was proposed to annex six (6) currently existing individual contiguous parcels of land into the corporate limits of the City ("Ordinance"). The

Ordinance had its first reading at a meeting of the City Council on January 16, 2007. On February 20, 2007, the Ordinance had its second reading at a meeting of the City Council, and, at that meeting, the passage of the Ordinance was certified because it was found by the City that the petition to the City to have the additional territory annexed into the City was made by all of the freeholders and all of the qualified voters within the additional territory, and that the Petition was sufficient in every respect pursuant to the requirements of W.Va. Code §8-6-4. (Certificate of Annexation Pursuant to an Ordinance attached hereto as Exhibit A [hereinafter "Certificate"]). On February 20, 2007, Joe Cosentini, Clerk for the City certified the Ordinance and entered it into the City's Journal in accordance with the requirements of W.Va. Code §8-6-4. (Certificate at Exhibit A). On April 12, 2007, a proposed Order was provided to the County Commission approving and confirming the annexation ("Order") (attached hereto as Exhibit B). Said Order was provided to the County Commission for entry in accordance with the provisions of W.Va. Codes §8-6-3 and 8-6-4(b) and met all requirements under those statutes. Respondent, the County Commission, by and through its Commissioners, has unlawfully refused to enter the Order despite the clear statutory mandate requiring it to do so.

III. STANDARD OF REVIEW

The West Virginia Supreme court will utilize the mechanism of a writ of mandamus as extraordinary relief when a public officer or body has failed in the performance of a mandatory, non-delegable duty. State ex rel. PSC v. Town of Fayetteville, 212 W.Va. 427, 573 S.E.2d 338 (2002). State ex rel. Beirne v. Smith, 214 W.Va. 771, 591 S.E.2d 329 (2003).

This Court has explained that "mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syl. Pt. 1, State ex rel. Allstate Insurance Co. v. Union Public Service Dist., 151 W.Va. 207, 151 S.E.2d 102 (1966). It is a proper remedy to require the performance by a county commission of its responsibilities with regard to the municipalities and territories

contained in the county's boundaries. Cowan v. County Commission of Logan County, 161 W.Va. 106, 127, 240 S.E. 2d 675, 686 (1977) (writ of mandamus granted and County Commission of Logan County ordered to enter order holding requirements of W.Va. Code §8-2-1 and 2 met and to proceed according to W. Va. Code §8-2-4 *et seq.*). Before the West Virginia Supreme Court of Appeals may properly issue a writ of mandamus, three elements must coexist: existence of clear right in petitioner to relief sought, existence of legal duty on part of respondent to do the thing petitioner seeks to compel, and absence of another adequate remedy at law. State ex rel. Blankenship v. Richardson, 474 S.E.2d 906, 196 W.Va. 726 (1996); W.Va. Code §51-1-3.

It is proper for a writ of mandamus to originally issue from this Court because circuit courts and the West Virginia Supreme Court of Appeals have concurrent original jurisdiction over proceedings in mandamus. See State ex rel. Silver v. Wilkes, 584 S.E.2d 548 (W.Va. 2003); State ex rel. Summerfield v. Maxwell, 135 S.E.2d 741 (W.Va. 1964) (Supreme Court of Appeals and the Circuit Court of Fayette County would have concurrent jurisdiction of mandamus proceeding by one candidate for county office to compel Fayette County board of ballot commissioners to omit another candidate's name from primary election ballot). In addition, there are no disputed issues of material fact to be adjudicated or discovered and because of the issues raised, it is likely that any decision of a circuit court would ultimately be appealed to this Court. Thus, initial consideration by this Court, at the earliest time procedurally available, will be the most economical use of judicial resources and will speed the final resolution of the issues raised. Finally, as a practical matter, if this writ was filed in the Circuit Court of Jefferson County, any Circuit Judge in Jefferson County would request recusal from this Court and refrain from ruling on this issue due to its impact on fellow Jefferson County judicial officers.

IV. ARGUMENT

The powers and duties of the County Commission are to be performed through Respondent, Jennifer Maghan, its Clerk. W.Va. Const. Art. IX, §12; W.Va. Code §7-1-3; State ex re. v. County Court v. Arthur, 150 W.Va. 293, 145 S.E.2d 34 (1965). West Virginia is still a *Dillon Rule* state. This time honored rule of law is stated as follows:

The county [commission] is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed. Point 3, syllabus Barbor v. County Court of Mercer County, 85 W.Va. 359 [101 S.E. 721 (1920)]. Syllabus Point 1, State ex rel. County Court v. Arthur, 150 W.Va. 293, 145 S.E.2d 34 (1965). State ex rel. State Line Sparkler of WV, Ltd, et al., v. Teach, et al., 187 W.Va. 271, 418 S.E.2d 585 (1992).

The County Commission has no authority to insinuate that its refusal to approve, confirm and enter the proposed Order of Annexation is an acceptable or proper means of land use regulation. The County Commission has a duty and obligation to recognize the municipal sovereignty of the City. The City is presumed to know what it is doing and has annexed territory and has refused to annex other territory in the immediate past. The County Commission is without the authority to refuse to enter the proposed Order. The County Commission has no interest, personal or official, in the municipal annexation matters that come before it other than to administer the law. Matter of City of Morgantown, Syl. Pt. 5, in part, 159 W.Va. 788, 226 S.E.2d 900 (1976). "The powers exercised by a county commission with regard to municipal annexation are wholly statutory and it can exercise no other powers except those implicit in the specific grant." Petition of City of Beckley to Annex. by Minor Boundary Adjustment, 194 W.Va. 423, 427, 460 S.E.2d 669, 673 (). This principle is consistent with our general law regarding a legislative grant of power to a municipality... "A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be

expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied’).” *Id.* At fn. 7 (1995) (citing syllabus Point 1 of McCallister v. Nelson, 196 W.Va. 131, 411 S.E.2d 456 (1991), syllabus Point 1, City of Fairmont v. Investors Syndicate of America [Inc.], 172 W.Va. 431, 307 S.E.2d 467 (1983), and syllabus Point 2, State ex rel. [City of] Charleston v. Hutchinson, 154 W.Va. 585, 176 S.E.2d 691 (1970). *See also* Syllabus Point 1, Cowan v. County Commission of Logan County, 161 W.Va. 106, 240 S.E.2d 675 (1977). “Moreover, it is generally recognized that the legislature may designate the power of annexation absent some constitutional limitations.” *Id.* *See generally*, 56 Am.Jur.2d *Municipal Corporations, Counties and Other Political Subdivisions*, §55 and §63 (1971).

W.Va. Code §8-6-4 expressly provides that annexation of additional territory into a municipality can occur without a vote upon a petition of a majority of freeholders and qualified voters in the additional territory seeking to be annexed. Upon satisfaction that the petition is sufficient in every respect, “the governing body shall enter that fact upon its journal and forward a certificate to that effect to the county commission of the county wherein the municipality or major portion of the territory thereof, including the additional territory, is located. The county commission **shall** thereupon enter an order as described in the immediately preceding section of this article [W.Va. Code §8-6-3]. After the date of the order, the corporate limits of the municipality shall be as set forth herein.” W.Va. Code §8-6-4. (emphasis added)

These annexation statutes, now contained in article six of chapter eight of the Code of West Virginia, provide three methods for properly altering municipal boundaries by annexation of additional territory. Matter of City of Morgantown, 159 W.Va. 788, 266 S.E.2d 900 (1976) (referring to the version of W.Va. Code §8-6-4 in effect in 1976). Although Section 4 (§8-6-4) was amended so as to no longer require sixty percent of the

voters and freeholders in the territory to be annexed, the ministerial role of the county commission with respect to the annexation procedure remains the same.

"Through the enactment of these general laws, the Legislature delegated certain functions and responsibilities to the county commission of each county. A county commission is required to perform a ministerial function when it enters an order reflecting the change in boundaries after municipal authorities certify compliance with the statutory procedures of section 2 or 4." *Id. at 903, 159 W.Va. at 792* (referring to W.Va. Code §8-6-2 and §8-6-4).

Accordingly, pursuant to the clear language of the statute, the entry of the Order which the Respondent President has refused to sign and the Respondent Clerk has refused to enter is a mandatory, non-discretionary and merely ministerial act. Mandamus lies to compel such actions. The Petitioners herein have a clear legal right to have such properly certified Order entered by the County Commission. W.Va. Code §8-6-4. The Petitioners are without adequate relief or remedy at law, in equity, or otherwise, save for the relief prayed for in this Petition.

The Petitioners aver that the City of Charles Town has also filed a Petition for Writ of Mandamus with this Court, involving the same properties and parties, and requesting the same relief. Accordingly, the Petitioners request that this matter be consolidated with the Petition of the City of Charles Town to be considered and heard concurrently by this Court.

In support of this Petition, Petitioners submit the attached Exhibits A through E as illustrative of the Certificate of Annexation Pursuant to an Ordinance, the resulting proposed Order, the minutes of the County Commission's meeting reflecting the action taken in refusing to execute and enter the proposed Order, aerial photographs showing the Petitioners' property to be annexed, and composite of Assessor's Tax Maps showing a portion of the existing areas of the City of Charles Town and the land proposed to be annexed.

V. CONCLUSION

WHEREFORE, the Petitioners pray that a rule be issued by this Honorable Court directed to the Respondents, Frances Morgan, President of the County Commission of Jefferson County, and Jennifer Maghan, Clerk of the County Commission of Jefferson County to show cause, if they can, why they should not enter the Annexation Order; that, after the Respondents shall have had an opportunity to respond to such rule, this Honorable Court issue a peremptory writ of mandamus commanding the Respondents to sign and enter the Annexation Order as required by West Virginia Code section 8-6-4; and that this Honorable Court give Petitioners such other and further relief, including attorneys fees, as it may deem appropriate and as this case may require.

**FIRST CHARLES TOWN GROUP,
INC., CHARLES TOWN LIMITED
PARTNERSHIP VI, HARRY M. KABLE
and CAROL F. KABLE, LARRY R.
FRITTS, SR., and RICHARD W.
WEESE and MARIA V. WEESE
BY COUNSEL**

Peter L. Chakmakian

Peter L. Chakmakian

Attorney for Petitioners

WV State Bar I.D. # 687

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(304) 725-9797

Alice Anne Chakmakian

Alice Anne Chakmakian

Attorney for Petitioners

WV State Bar I.D. # 7353

P.O. Box 547

Charles Town, WV 25414

(304) 725-9797

STATE OF WEST VIRGINIA

COUNTY OF JEFFERSON, to wit:

RICHARD W. WEESE, Executive Vice President of FIRST CHARLES TOWN GROUP, INC., PETITIONER named in the foregoing PETITION OF FIRST CHARLES TOWN GROUP, INC., CHARLES TOWN LIMITED PARTNERSHIP VI, HARRY M. KABLE and CAROL F. KABLE, LARRY R. FRITTS, SR., and RICHARD W. WEESE and MARIA V. WEESE FOR WRIT OF MANDAMUS, being duly sworn, says that the facts and allegations contained therein are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information, he believes them to be true.

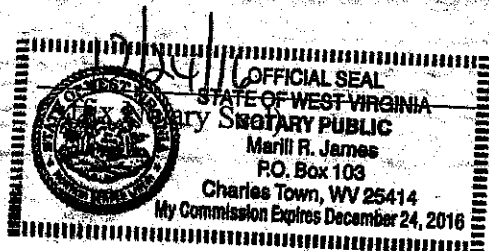
FIRST CHARLES TOWN GROUP, INC.

BY:

Richard W. Weese
Richard W. Weese, Executive Vice President

Taken, sworn to and subscribed before me this 30th day of April, 2007.

My commission expires:



Marli R. James
Notary Public

STATE OF WEST VIRGINIA
COUNTY OF JEFFERSON, to wit:

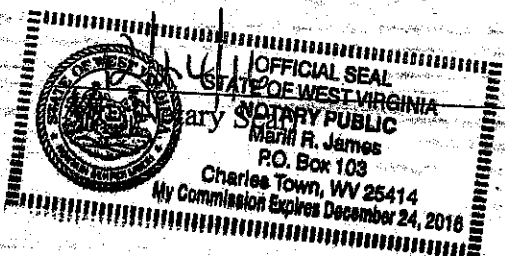
MARIA V. WEESE, General Partner of CHARLES TOWN LIMITED PARTNERSHIP VI, PETITIONER named in the foregoing PETITION OF FIRST CHARLES TOWN GROUP, INC., CHARLES TOWN LIMITED PARTNERSHIP VI, HARRY M. KABLE and CAROL F. KABLE, LARRY R. FRITTS, SR., and RICHARD W. WEESE and MARIA V. WEESE FOR WRIT OF MANDAMUS, being duly sworn, says that the facts and allegations contained therein are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information, she believes them to be true.

CHARLES TOWN
LIMITED PARTNERSHIP VI

BY: Maria V. Weese
Maria V. Weese, General Partner

Taken, sworn to and subscribed before me this 30th day of April, 2007.

My commission expires:



Mari R. James
Notary Public

STATE OF WEST VIRGINIA
COUNTY OF JEFFERSON, to wit:

HARRY M. KABLE and CAROL F. KABLE, husband and wife, LARRY R. FRITTS, SR., and RICHARD W. WEESE and MARIA V. WEESE, husband and wife, PETITIONERS named in the foregoing PETITION OF FIRST CHARLES TOWN GROUP, INC., CHARLES TOWN LIMITED PARTNERSHIP VI, HARRY M. KABLE and CAROL F. KABLE, LARRY R. FRITTS, SR., and RICHARD W. WEESE and MARIA V. WEESE FOR WRIT OF MANDAMUS, being duly sworn, says that the facts and allegations contained therein are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information, they believe them to be true.

Harry M. Kable
Harry M. Kable

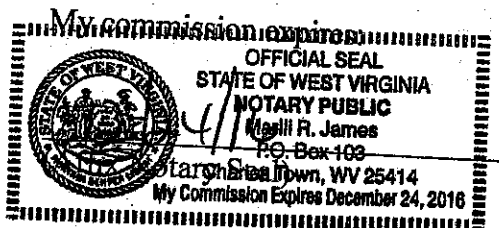
Carol F. Kable
Carol F. Kable

Larry R. Fritts, Sr.
Larry R. Fritts, Sr.

Richard W. Weese
Richard W. Weese

Maria V. Weese
Maria V. Weese

Taken, sworn to and subscribed before me this 30th day of April, 2007.



Merrill R. James
Notary Public

SCHEDULE OF EXHIBITS

- EXHIBIT A** **CERTIFICATE OF ANNEXATION PURSUANT
TO ORDINANCE**
- EXHIBIT B** **PROPOSED ORDER OF ANNEXATION (REFUSED
THE COUNTY COMMISSION)**
- EXHIBIT C** **MINUTES OF THE MEETING OF THE COUNTY
COMMISSION DURING WHICH PROPOSED ORDER
OF ANNEXATION WAS REFUSED**
- EXHIBIT D-1** **AERIAL PHOTOGRAPH DEPICTING CITY OF
CHARLES TOWN AND THE TERRITORY OF LAND
PROPOSED TO BE ANNEXED**
- EXHIBIT D-2** **AERIAL PHOTOGRAPH DEPICTING CITY OF
CHARLES TOWN AND THE TERRITORY OF LAND
PROPOSED TO BE ANNEXED**
- EXHIBIT E** **COMPOSITE OF ASSESSOR'S TAX MAPS SHOWING
A PORTION OF THE EXISTING AREAS OF THE
CITY OF CHARLES TOWN AND THE TERRITORY
OF LAND PROPOSED TO BE ANNEXED**